DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

RHEA DOWLING, **Plaintiff,** **v.** **ANTHONY CRANE INTERNATIONAL, HESS OIL VIRGIN ISLANDS CORP. and AMERADA HESS,** **Defendants**	**CIVIL NO. 1998/127**

TO: Lee J. Rohn, Esq.
Beth Moss, Esq.

ORDER DENYING PLAINTIFF'S MOTION PURSUANT TO RULE 56(f)

THIS MATTER came for consideration on Plaintiff's Motion Pursuant to Fed. R. Civ. P. 56(f) in opposition to the Motion for Summary Judgment of Defendants HOVIC and AHC. Defendant's filed opposition to the Motion and Plaintiff filed a reply thereto.

Plaintiff contends that she needs additional discovery before she can respond to Defendants' Motion for Summary Judgment.[1] Plaintiff asserts that "...discovery is in its infancy in this case and Plaintiff has not had the opportunity to depose Defendant." Plaintiff argues that she requires information as to

1. Apparently, at issue therein is whether HOVIC and AHC were Plaintiff's "employers" and thus liable under Title VII. Plaintiff cites, *inter alia*, *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992).

who had control of Plaintiff's day to day activities; whether Plaintiff was the borrowed employee of Defendants HOVIC and AHC; and whether Plaintiff was an intended beneficiary of the contract between Defendants HOVIC and Crane.

The Defendants opposition includes that Plaintiff had adequate opportunity to obtain discovery during the pendency of the case.

Plaintiff's Complaint was filed on May 20, 1998. HOVIC and AHC filed their answer on June 5, 1998. The Answer denied all allegations that asserted that HOVIC and AHC had the indicia of employers of Plaintiff (Count II of the Complaint) and expressly pled as Affirmative Defense No. 1 that, "Neither Defendant HOVIC nor AHC has ever been Plaintiff's 'employer' for Title VII purposes." Defendants note correctly that they also raised such issue at the first pretrial conference (on July 23, 1998).

Plaintiff's motion describes the written discovery propounded by Plaintiff during the thirty-two (32) months this case has been at issue and that some responses from defendants have been deficient. To date, Plaintiff has not invoked the aid of the Court to compel more prompt responses or to compel correction of any responses received. No depositions have been taken.

Fed. R. Civ. P. 56(f) provides that:

> (f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear that the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Court of Appeals for the Third Circuit has interpreted such rule as requiring the party seeking further discovery to explain why such discovery was not previously obtained. *Dowling v. City of Philadelphia et al.*, 855 F.2d, 136, 140 (3d Cir. 1988). It has generally been held that a Rule 56(f) continuance should be granted as a matter of course unless the party has not diligently pursued relevant discovery. *Wichita Falls Office Associates v. Banc One Corp. et al.*, 978 F.2d 915, 919 (5th Cir. 1992).

> Notwithstanding the usual generous approach to granting Rule 56(f) motions, the rule is not properly invoked to relieve counsel's lack of diligence.

Berkeley v. Home Insurance Co., 68 F.3d 1409, 1414 (D.C. Cir. 1995) *cert. den*. 157 U.S. 1208, 116 S.Ct. 1825 (1996). See also: *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996), cert. den. 522 U.S. 950, 118 S.Ct. 369 (1997); *Druid Hills Civil Assoc., Inc. v. Federal Highway Administration et al.*, 833 F.2d 1545, 1550 (11th Cir. 1987); cert. den. 488 U.S. 819, 109 S. Ct. 60 (1988).

> To savor the balm of Rule 56(f) a party must act in a timely fashion.

Mass. School of Law at Andover, Inc. v. American Bar Association, et al. 142 F.3d 26, 44 (1st Cir. 1998).

> Moreover '[t]he district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past.'

Conkle v. Jeong et al., 73 F.3d 909, 914 (9th Cir. 1995).

In this matter, Plaintiff has been aware of the issue since June 1998 and has not diligently pursued discovery in such regard during the ensuing thirty-two (32) months. Accordingly, it is hereby;

ORDERED as follows:

1. Plaintiff's motion to conduct additional discovery prior to responding to the Motion for Summary Judgment is DENIED.

2. Plaintiff shall serve her response to Defendants' Motion for Summary Judgment by March 15, 2001.

ENTER:

Dated: February 26, 2001

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By:_____
Deputy Clerk